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Perspective

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Plug those government leaks

By Guenter Lewy

President Reagan recently served notice to federal employees that he doesn't intend to tolerate any more "leaks" of classified government information. Passing out such information, the President said, is "improper, unethical, plain wrong" and "illegal."

Unfortunately, the law isn't that clear. An employee of the Department of Agriculture who reveals data on next year's soybean crop estimate may find himself behind bars. But an employee of the Defense Department who leaks classified defense information to members of the press is probably not guilty of any criminal offense. Similarly, a reporter who obtains secret national security information and publishes it on the front page of his newspaper most likely has not committed espionage or violated any law.

Today the United States may be the only nation without any meaningful defense against the publication of classified defense information. Great Britain, the oldest democracy, has one of the strictest systems of official secrecy. The United States could take measures to protect its vital secrets without sacrificing its liberties.

Present statutes on espionage and the disclosure of classified information by present or former government employees become a veritable minefield of legal ambiguities when applied to publishing. Analysis of the legal history and language of the statutes suggests that they do not prohibit publication of defense information.

One law, for example, proscribes communication of information respecting the national defense to a foreign government or citizen; one who publishes such information does not thereby communicate it to foreigners in the sense of the statute, nor does one necessarily have a culpable intent to injure the United States or aid a foreign power—an intent required for prosecution.

There is, moreover, the question of the meaning of "information respecting the national defense." In an era when virtually every facet of civilian life can have an important bearing on the nation's military capabilities, what kind of information is included or excluded by that phrase?

Other statutes bearing on the publication of defense

information for the most part aim at employees of the government. Here, too, it is apparent that Congress went out of its way to exempt newspapers and reporters.

Despite numerous opportunities, no prosecution has ever been brought under the espionage laws for the publication of secrets damaging to national security. Even in the Pentagon Papers case, when an attempt to prevent publication was made, the government did not rely on the espionage statutes; some justices expressed the view that the espionage laws might have authorized criminal sanctions against the newspapers and reporters involved.

Although the basic need to withhold from the public certain kinds of information is accepted, the facts of American political life greatly complicate matters. There is, first, the ever-present problem of overclassification. A system of classification that lacks integrity is a direct cause of leaks. Another complicating element is the widespread practice by top officials of declassifying information they want to leak.

The Watergate scandal has undoubtedly created great difficulties for the enactment of new legislation. Passage of even a modest proposal—a law to protect the identities of U.S. intelligence agents—required the expenditure of a lot of political capital. The United States today denies its intelligence agencies the secrecy granted physicians; it gives foreign agencies a license to poke into its files. The willingness of allies to share their information and the willingness of Americans to risk their lives for their country have diminished, yet bills to exempt the intelligence agencies from the Freedom of Information Act have made no headway. The public has developed a right-to-know mentality, and journalists consider any information, no matter how sensitive, fair game.

I favor legislation prohibiting the publication of defense information classified "secret." The media should be vigorous in airing general issues of policy, but they should not presume to judge what kind of data requires protection.

Legal systems work when the law is perceived as fair, just and necessary. In the final analysis, the results of any legislation will depend on basic political attitudes and shared values. Whether a reservoir of basic trust between government and the governed, including the media, and a consensus on common national aims can be achieved in the United States will have as much significance for the better protection of American secrets as the enactment of new legislation.

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